SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

GERALD B. BROPHY,
Attorney for Petitioner.

CHARLES PICKETT,
JOSEPH S. ISEMAN,
of Counsel.

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This case has been inflated to undue proportions. It comes down to one concrete, practical issue. If TWA's mail rate was unreasonably low, does the Board lack *power* to say so, fix a fair rate and make it effective from the date that the rate actually became too low?

The Act "empowered" the Board, after notice and hearing, "to make such rates effective from such date as it shall determine to be proper." All the Board's "public utility" slogans, rarefied policy arguments and dialectical subtleties cannot obscure that simple fact. Like the Court below, it wanders away from what the Act says into the realm of policy, with the net result that the "make effective"

clause ends by being twisted into something that Congress could have said but just did not say.

Congress could have used in §406 the same language which is in the Act's public utility rate provisions, but it did not. It could have given the Board a limited power to make mail pay rates effective only for the future, or only from the filing date of the proceeding, but it did not. Congress did something entirely different. Revision of the Act is the province of Congress. The Board is asking the Court to rewrite the statute in the guise of interpreting it. If the Board does not like the "make effective" clause, it should ask Congress to change it. If it does not feel that it can be trusted to exercise the broad power which Congress gave it, it should ask Congress to revise the Act so as to tie its hands. The language of the Act is perfectly plain, and while it stands it must be taken as it reads.

Time does not permit a reply to all the Board's arguments. Many of them were considered fully in our main brief. Certain other points will be noted here.

I. The Unambiguous Language of Section 406.

The Board's basic argument is that, if the power conferred by §406(a)(1) "to make such rates effective from such date as it shall determine to be proper" is construed to mean just what it says, the "Act's directions to 'fix' 'rates', to take into consideration the service 'to be rendered', and the need for compensation 'to insure the performance' of such service, all become meaningless" (Res. Br., pp. 11-12).[1] "Many of the words and phrases used in

[1] We shall refer to the Board's brief as "Res. Br." and our main brief as "Pet. Br.," and continue to use the abbreviations in Pet. Br., p. 1, note 1. Unless otherwise stated, all italics are ours.

Section 406 point to the necessity for interpreting the Act as the Board and the Court of Appeals did" (Res. Br., p. 47).

As this Court recently said of another statute: "The language selected by Congress . . . . is simple and direct. Consideration of its meaning by the introduction of dialectical subleties can serve no useful interpretative purpose."[2] None of the "words and phrases" in §406 necessitates, or justifies, reading limitations into the "make effective" clause which Congress did not put there.

A. The Word "Rates."

First the Board suggests that the word "rates" shows that Congress was referring to a "measure of payment for future operations" (Res. Br., p. 48). "Rates" varies widely in meaning[3], like most words.[4] In the field of mail pay, it has no connotation at all of a "measure of payment for future operations." Nor is there anything "meaningless" about fixing a "rate of compensation" for carrying the mails in the past. For generations mail pay "rates" have been fixed and revised for past periods (see Pet. Br., pp. 13-16, 32).

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[2] *Coray* v. *Southern Pacific Co.*, 93 L. Ed. adv. op. 243, 245 (Jan. 3, 1949).

[3] "The word 'rate' in our statute, like most other words, has different meanings dependent upon the context and the result intended to be accomplished." *Central Nat. Bank* v. *City of Lynn*, 259 Mass. 1, 12, 156 N. E. 42, 47.

[4] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425. See also, *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 545; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124.

1. In former days the Postmaster General regularly fixed mail pay "rates" for past periods. Typical is the following "circular notice of adjustment of pay" sent in *December*, 1877, fixing a revised mail rate from *July*, 1877, as well as for the future:

> "The compensation for the transportation of mails, etc., on your road, route between and , has been fixed from July 1, 1877, to June 30, 1881 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, upon returns showing the amount and character of the service for thirty days, commencing April 16, 1877, at the *rate* of per annum, being $ per mile for miles."[5]

Similar orders, fixing mail pay "rates" for past as well as for future services, were repeatedly made by the Postmaster General.[6] Neither he nor the courts thought that

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[5] *Eastern Rd. Co. v. United States*, 129 U. S. 391, 393. This was a 10% reduction from the prior rate. Later, on July *12*, 1878, the Postmaster General decreased the pay again "from July *1*, 1878, to June 30, 1881, $558.19 per annum, leaving the pay from the first-named date $13,233.55 per annum, being a reduction of five per centum from the *rates* fixed for weight of mails in accordance with" a statute passed in June 1878. See 129 U. S., at p. 394.

[6] For instance, in *Chicago, Milwaukee & St. Paul Ry. Co. v. United States*, 198 U. S. 385, the first order, made *December* 1, 1890, provided that "compensation for the transportation of mails" for an entire route "has been fixed from *Sept.* 23, 1890, to June 30, 1891 . . . at the *rate* of $35,022.37 per annum, being $132.53 per mile for 264.26 miles" (p. 387). The second order, made *December* 3, 1890, provided that "compensation for the transportation of mails" on only the extended portion of the route "has been fixed from *February* 24, 1890, to June 30, 1891 . . . at the *rate* of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension" (p. 388).

there was anything meaningless about fixing a "rate" of mail pay for past periods.

2. Nor did the Interstate Commerce Commission suppose that it was meaningless to fix "rates" of railway mail pay for past operations. Its very first decision under the Railway Mail Pay Act, handed down in December, *1919*, prescribed in detail "the fair and reasonable *rates* of payment for transportation of mail matter *as of* November 1, *1916*, and to January 1, *1918*."[7] Likewise its order sustained in *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, made on December 8, *1925*, "established" certain "*rates* of pay" as "the fair and reasonable *rates* for the period from February 25, *1921*, to December 13, *1923*, with respect to the said carriers."[8]

For other cases setting forth similar orders verbatim see, *e.g.*, *Jacksonville, Pensacola & Mobile Rd. Co.* v. *United States*, 21 C. Cl. 155, 159-162, affd. in 118 U. S. 626; *Minneapolis & St. Louis Ry. Co.* v. *United States*, 24 C. Cl. 350, 351-354; *Alabama, Great Southern Rd.* v. *United States*, 25 C. Cl. 30, 32-33, affd. in 142 U. S. 615; *Wisconsin Central Rd. Co.* v. *United States*, 27 C. Cl. 440, 448-450, affd. in 164 U. S. 190; *Texas & Pacific Ry. Co.* v. *United States*, 28 C. Cl. 379, 381-383; *Evansville & Indianapolis Rd. Co.* v. *United States*, 32 C. Cl. 555, 556-558; *Louisville & Nashville Rd. Co.* v. *United States*, 46 C. Cl. 267, 268.

[7] *Railway-Mail Pay*, 56 I. C. C. 1, 77. "The fair and reasonable *rates* on and after January 1, 1918, are 25 per cent additional to the rates prescribed as of November 1, 1916." *Ibid.*, at p. 78. "Manifestly this was "the fixing of a rate for the past," since "the order was made nearly two years after the effective date." *New York Central Rd. Co.* v. *United States*, 65 C. Cl. 115, 127, affd. in *United States* v. *New York Central Rd. Co.*, 279 U. S. 73.

[8] The order is not set forth in the reported opinions, but appears at p. 13 of the Transcript of the Record.

3. Congress saw nothing meaningless in providing for retroactive adjustment of air mail pay in terms of "rates."[9] Nor did the Commission evidence any embarrassment in fixing "rates" for past periods, as well as prospectively, under the Air Mail Acts (Pet. Br., pp. 56-59). Even Commissioner Mahaffie, who found reasons for dissenting from every retrospective rate change, failed to discern anything contradictory about fixing a "rate" for services already rendered.[10]

4. The Board itself has not found it meaningless to fix "rates" for past services. Repeatedly it has referred to "rate proceedings involving the fixing of mail rates for past periods"[11] without the faintest intimation that there is something peculiar about fixing a "rate" for the past.[12]

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[9] The Air Mail Act of 1935, 49 Stat. 617, passed in *August*, 1935, provided that "compensation therefor, on and after *March* 1, 1935, during such period of indefinite continuance, shall be paid at the *rate* fixed by order of the Commission." See Pet. Br., pp. 55-56, B10.

[10] His dissenting opinions may be searched in vain for any intimation that the word "rate" supported his position. *Air Mail Compensation*, 216 I. C. C. 166, 191; *Air Mail Rates for Route No. 33*, 216 I. C. C. 381, 403; *Air Mail Compensation*, 222 I. C. C. 602, 610.

[11] *Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 291, note 22.

[12] "In making this retroactive determination . . . such nonpay mail schedules should be taken into account in the fixing of a rate of compensation on the mileage flown on the pay mail schedules during this past period." *Northwest Air Lines, Inc.—Mail Rates*, 1 C. A. A. 275, 283. ". . . we find that the fair and reasonable rate of compensation from March 1, 1941, to June 12, 1941, was 51 cents per mail pay mile flown." *Chicago & Southern Air Lines,*

What is more, repeatedly it has fixed mail pay for past periods in terms of "rates."[13] Many of its "decisions have in fact involved an upward adjustment of rates over a past period."[14]

5. The argument is continuously made that "rates of compensation" is used in contrast to "amounts of compensation." This quibble ignores the fact that in the final analysis the airline is entitled to "reasonable compensation," which is an amount reached by multiplying the "rate" by the number of units of mail carried (Pet. Br., pp. 28-29). Rates of compensation are expressed in amounts of money—45¢ per airplane mile, .03¢ per pound mile, and so on—and every rate is fixed to provide the airline with a certain amount of money. The amount of reasonable compensation for past services can therefore be

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Inc.—Mail Rates for Route Nos. 8 and 53, 3 C. A. B. 161, 195. "We will therefore adhere to our previously announced policy against fixing a rate which will result in recovery from the carrier of substantial sums previously received as mail compensation." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 776. See also the decisions cited in Pet. Br., p. 43, note 48.

[13] Some of the decisions are referred to in Pet. Br., pp. 29 (note 27), 42 (note 45), 43, 85-96. Typical is the order in *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, made on *October* 26, 1945: ". . . on and after *January* 1, 1945, the fair and reasonable *rate* of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith . . . is hereby *fixed*, determined, and published to be 45 cents per ton mile, or fraction thereof, of mail carried, computed monthly on direct airport-to-airport mileage . . ." (p. 603).

[14] *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 326.

expressed in terms of a "rate."[15] In fact, the Board often expresses the "rate" for the past not as a per unit figure but simply as a "total amount."[16]

In short, the word "rates" does not mean a "measure of payment for future operations." Nor does it become "meaningless" if the "make effective" clause is construed as it reads. "Rates" means just what it has always meant in the field of mail pay—a means of computing compensation for services, past or future.

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[15] For example, in *Pan American Airways, Inc., Alaska Mail Rates*, 8 C. A. B. 244, the order made on July 9, 1947, provided that "the fair and reasonable *rate* of compensation . . . is hereby *fixed*, determined, and published for the period August 1, 1944, through December 31, 1945, to be *a total amount* of $2,572,000" (p. 260). The Board added, in a footnote, "This amount is equivalent to 90.36 cents per revenue plane mile flown in Alaska operations, excluding charter services and services over the Fairbanks-Bethel nonmail route." For similar orders, see, *e.g., Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 292; *Chicago & Southern Air Lines, Inc.*, Order No. E-1825, p. 2 (July 28, 1948).

[16] In *Pioneer Air Lines, Inc., Mail Rates*, 8 C. A. B. 175, operations began on August 1, 1945. The petition was filed on August 21, 1945. The order, made on July 2, 1947, provided in part (p. 197):

> "That the fair and reasonable *rates* of compensation to be paid the petitioner for the transportation of mail by aircraft, the facilities used and useful therefor and the services connected therewith . . . are hereby *fixed*, determined and published to be as follows:
>
> "1. For the period August 1, 1945, through August 31, 1946, *a total amount* of $505,420."

The order did not include a footnote explaining that the "total amount" was "equivalent to" or "equal to" a stated number of cents per mile. For other like orders, see, *e.g., Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, 78; *Pan American Airways, Inc., Transpacific Mail Rates*, 6 C. A. B. 83, 84; *Caribbean-Atlantic Airlines, Inc., Mail Rates*, 7 C. A. B. 943, 956.

B. The Word "Fix."

Next the Board concentrates on the word "fix." "The well understood meaning of 'fix' is 'to settle', 'make permanent', 'make certain.' . . . It is impossible to consider a rate as fixed if at any time thereafter it can be revised. It is clear, therefore, that 'fix' cannot be given its normal meaning if the 'make effective' clause is given the meaning which TWA asserts is plain" (Res. Br., p. 49).

Like "rate," the word "fix" has no unvarying "normal" meaning. It "is sometimes used in a broad sense and sometimes in a narrow sense" and "there is no charm about the word itself dominating the situation so that it may not be construed to make the statute comport with reason."[17] Of course in this statute "fix" does not connote permanence or immutability.[18] For §406(a)(1) expressly states that the Board is empowered "to fix and determine *from*

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[17] *Gist* v. *Rackliffe-Gibson Const. Co.*, 224 Mo. 369, 387, 123 S. W. 921, 926-927. Earlier the Court said: "'Fix,' as defined by lexicographers, is used sometimes to accentuate the idea of firmness, stability, immobility, permanence, without variation—but in laws, documents and conversation it is not always used in that strong way. It may mean (depending somewhat upon the context and sense of the thing) prescribe, allow, designate, arrange, determine, decide." 224 Mo., at p. 385, 123 S. W., at p. 926.

[18] Even in a public utility rate statute, "fix" has no such connotation. In *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, an ordinance authorized the city council to contract for the maintenance of waterworks "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." This Court refused to hold that ring words should "be construed to mean by ordinance once for all to endure during the whole period of thirty years," since that construction "would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time" (p. 600).

time to time[19] . . . the fair and reasonable rates of compensation for the transportation of mail by aircraft." Plainly the Act itself considers "a rate as fixed" although "at any time thereafter it can be revised." The authorities already mentioned show that mail pay rates have been for decades, and still are, "fixed" for past periods.[20]

What "fix" means in §406 is perfectly evident. It is used in the sense of "set," "specify," "name."[21] The

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[19] In *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, an order (quoted in full *supra*, p. 4) "fixed" a mail rate for July 1, 1877, to June 30, 1881, *"unless otherwise ordered."* A later order, made on July 12, 1878, reduced the rate 5% "from July 1, 1878, to June 30, 1881." This Court held that even if the first order constituted a contract, "still, as, by the terms of both the order and the notice, those rates were to govern, 'unless otherwise ordered,' there is no ground for the company to complain of the subsequent reduction of five per cent . . . It cannot be said that the reduction of five per cent was a violation of that contract; for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such future orders as the Postmaster General might make" (p. 395). To the same effect, see *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Delaware, Lackawanna & Western Rd. Co.* v. *United States*, 249 U. S. 385, 387-388; *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 256 U. S. 610, 613-614.

[20] In fact, the Board has no difficulty in providing in the same order that a "fair and reasonable *temporary* rate . . . is hereby *fixed*, determined and published" from a stated date and that "there shall hereafter be *fixed* and determined . . . the final fair and reasonable rate or rates of compensation . . . which rate or rates shall be retroactively effective" from the same date. *Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 691-692. For other examples see Pet. Br., p. 42, notes 45 and 46.

[21] *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, indicated the meaning of the word "fix" in mail pay cases: "The statute defined a car line, but did not *fix* the compensation. It left that to be *determined* by the Postmaster General, who could have *named* any rate, not to exceed the statutory maximum" (p. 649).

Board is empowered not merely to ascertain or determine fair and reasonable rates of compensation, but to put them into effect.[22]

There is never, however, one single rate which alone is fair and reasonable. A whole "zone of reasonableness" exists.[23] All rates within that zone are reasonable. Thus, the Board distinguishes between a "need" rate and a "service" rate; the "need" rate is substantially higher.

The Act says "fix and determine." At times it appears to use the words interchangeably. Thus the first sentence of §406(b) says that in "fixing and determining fair and reasonable rates of compensation" the Board "may *fix* different rates for different air carriers or classes of carriers." The second sentence then begins, "In *determining* the rate in each case . . ." The word "determine," standing alone, might have given rise to some question, since occasionally it is used to mean "find" or "ascertain" as distinguished from "put into effect." (*Cf. United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 542: "The Board has not *ordered* a refund. It could not rightly do so, for its jurisdiction is limited to the *determination* of the amount of deficiency or overpayment . . .") Any possible doubt on that score was obviated by saying "fix and determine."

[22] *Cf. Kihlberg* v. *United States*, 97 U. S. 398: "The parties, however, concurred in designating a particular person . . . with power not simply to *ascertain*, but to *fix*, the distances which should govern in the settlement of the contractor's accounts for transportation" (p. 401); *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591: "But the Commission maintains that it has the power to make *findings* as to the lawfulness of past rates even though it has no power to *fix* those rates" (p. 618).

[23] *American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617, 624; *United States* v. *Illinois Central Rd. Co.*, 263 U. S. 515, 524; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 506; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 636; *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585-586; *Interstate Commerce Comm.* v. *Inland Waterways Corp.*, 319 U. S. 671, 685; *Ayrshire Collieries Corp.* v. *United States*, 93 L. Ed. adv. op. 220, 228 (Jan. 3, 1949).

but both are supposed to be reasonable.[24] In the case of mail pay, the Board does not merely define the zone of reasonable rates, by selecting maximum and minimum figures, as it always may (and, in some cases, must) do in the case of public utility rates.[25] On the contrary, it must specify the precise mail rate—name it, "fix" it. That is exactly what the Board does now when it revises mail rates for past periods, and what it will still do if the "make effective" clause is given its manifest meaning.

C. Other Phrases in §406.

Next the Board isolates certain phrases in §406(b), which lists numerous factors to be taken into consideration when mail rates are determined. Among other things, the Board shall consider "the need of each such carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and . . . to enable such air carrier . . . to maintain and continue the development of air transportation to the extent and of the char-

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[24] "The 'service' as opposed to the 'need' mail rate is not designed to meet the financial need of the individual carrier but rather it is intended to be fair and reasonable in terms of both the quality of the service and the reasonable and necessary costs under conditions of economical and efficient management." *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 599.

[25] The Board's power over public utility rates—passenger and cargo rates—is set forth in §1002(d) of the Act, 49 U. S. C. §642(d), quoted in Pet. Br., pp. B21-B22. When the Board may act thereunder, it "shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof)," except that "as to rates, fares, and charges for overseas air transportation" it "shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge."

acter and quality required for the commerce of the United States, the Postal Service, and the national defense."

The Board asserts that "if these words are to be given content they must limit or else conflict with the asserted meaning of the 'make effective' clause, for what is to happen in the future is hardly a proper consideration for determining the extent of payments for past services." (Res. Br., pp. 48-49). The argument borders on the frivolous. It is like saying that, in determining how much medication to give immediately to a starving man, to compensate for past deficiencies in his diet, it is entirely irrelevant whether he is to be built into a robust person or kept barely alive as a walking skeleton. To be more specific, it means that after making a rate prophecy for the future which turns out to be disastrously wrong, the Board is merely permitted to make another prophecy which may turn out to be no better than if a previous one. The evil which would result from imposing prophecy upon prophecy is made apparent by looking again at the mistake which the Board made in 1945 affecting TWA, American, United and Eastern (see Pet. Br., pp. 12-13, note 4).

Actually, when the Board fixes a mail rate for the past, of course it considers the adverse effect of insufficient pay on the airline's future ability to operate.[8] The obvious reason is that, if too little pay is given for past service, the airline may be so weakened financially that it cannot properly perform the service thereafter. "The evidence

[8] *See, e.g., Pennsylvania-Central Airlines Corp., Mail Rates*, 4 C. A. B. 22, 36; *All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 351, 362; *Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 695; *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 425; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 619.

indicates that the carrier has continuously operated at such annual deficits as to hamper its operations and the maintenance and development of its service."[27] Palliatives operating for the future may work too late; indeed, failure to adjust the rate for the past may disable the airline completely from continuing "performance of such service."[28]

D. The Contrast Between the "Make Effective" Clause and the Act's Provisions Relating to Public Utility Rates.

Section 406(a)(1) empowers the Board "to make *such* rates effective from such date as it shall determine to be proper." The Board says that the word "such" is "significant" (Res. Br., p. 49). Of course it is, but it does not have the mysterious significance which the Board seems to attach to it.

The word "such" identifies those rates, and those rates alone, which the Board is to make effective "from such date as it shall determine to be proper." The Board is not given that power with respect to "rates" generally, as

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[27] *Mid-Continent Airlines, Inc., Mail Rates*, 1 C. A. A. 45, 48.

[28] Another factor mentioned in §406(b) is "such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law." The Board suggests that the phrase "to be rendered" also shows that the rates must "apply to future operations" (Res. Br., p. 48). Manifestly all the language means is that the Board shall take into account the fact that the service for which the rate is determined must satisfy all prescribed standards. Sub-standard services are not worth as much as services up to standard, and of course the Board can take that into effect in fixing the rate for past periods. One could just as well argue that §406(a)(1) shows that rates can be fixed only for the past because they must provide "compensation for the transportation of mail by aircraft, the facilities *used* and useful therefor," instead of "the facilities to be used and useful therefor."

might be contended if "such" had been omitted. It has that power only as to those rates specified in §406(a)—the "rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith." Thus "such" makes it doubly plain that the Board has no such power over any other kind of rates.

For the Board does not dispute that the "make effective" clause is different from the provisions of the Act dealing with passenger and cargo rates. The airlines' public utility rates may be changed only prospectively. Divisions of public utility rates may be adjusted only "from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto" (see Pet. Br., pp. 18-19, 35-36). No such limitations on the Board's power were written into the broad language of §406(a)(1).

"The most likely reason for the difference between its language [*i.e.*, the 'make effective' clause] and that of other parts of the Act," the Board speculates, "is that they were prepared by different draftsmen, the 'make effective' clause being engrafted onto a completed bill" (Res. Br., pp. 71-72). The speculation ignores the practical differences between mail pay adjustments and public utility rate changes which explain the differentiation between them (Pet. Br., pp. 33-37). It attributes to the draftsman of the "make effective" clause, who discussed the entire 1937 bill at length, utter inability to distinguish between palpably different language, although in other respects he is granted extremely acute powers of discrimination. It glosses over the fact that, after the 1937 bill died without

coming to a vote, it was thoroughly studied and revised.[29] During its scrutiny, the marked differences between the mail pay and public utility rate provisions could hardly have escaped notice.

But, as the Board confesses, its speculation is really beside the point (Res. Br., p. 72). Most statutes are the handiwork of many draftsmen. Nonetheless, a statute must be construed as a whole. The breadth of the "make effective" clause must be read in the light of, and gains added significance from, the restrictive wording of other parts of the Act.[30]

II. The False Analogy to Public Utility Rate Statutes.

The Board's appeal to this supposed analogy ignores the fact that the Act's mail pay provisions do *not* "embody public utility rate-fixing concepts" (Res. Br., p. 9). One

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[29] For a detailed summary of the steps taken during the period from 1937 to 1938, see Rhyne, *Civil Aeronautics Act Annotated* (1939), pp. 51-65, 210-213, 215-220. As Representative Lea, who sponsored the 1938 bill in the House, put it: "Anyone studying the bill will find that this past bill [*i.e.*, the bill passed in 1938] is a more refined piece of legislation [than] the bill of last year [*i.e.*, the 1937 bill]. It has gone more into detail, with more care. Naturally, out of these months of controversy and study that situation has developed." *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong., 3d Sess.*, p. 310.

[30] *Cf. United States* v. *American Union Transport, Inc.*, 327 U. S. 437, 445: "In the face of such repeated demonstrations that Congress makes its purpose plain, when it actually intends to limit the coverage of others than carriers to affiliate or to persons performing part of the transportation service, *the conclusion hardly is tenable that it means the same thing when it employs more broadly inclusive language and wholly omits all such limitations.*" See also, *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 77.

such concept, and the most relevant one for present purposes, is that public utility rates are changed only prospectively, but concededly 406 does not "embody" it. On the contrary, it uses unique language found in no public utility rate statute. "White" does not mean "black," especially where Congress says "black" (when it means it) in the very same statute.

A decade ago this Court rejected one attempt to analogize procedure under public utility rate legislation to mail pay statutes.[31] Only last year, construing this very Act, it repudiated the same kind of analogy.[32] The detailed fallacies in the analogy need not be explored again (Pet. Br., pp. 27-44). A few of the Board's attempts to convert white into black, however, should be noted.

A. The Language of the Act.

1. Of course, parallel objectives are considered when fixing mail pay and reviewing the airlines' public utility tariffs (Res. Br., p. 26). It would be astonishing if it were otherwise. The different provisions of the Act were not designed to work at cross-purposes, but to promote the same national ends. Those basic objectives underlie many Federal statutes.

Nothing obliged Congress, however, always to use precisely the same road to reach its ultimate goal. It had a wide choice of alternatives between which to choose. In-

[31] *United States* v. *Griffin*, 303 U. S. 226, rejected the argument that the remedy under the Urgent Deficiencies Act should be applicable to railway mail pay orders because it applied to orders under public utility statutes "fixing rates payable by shippers" (p. 237).

[32] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 107-108 (Pet. Br., p. 44).

deed, this very Act evidences a keen differentiation between changes in mail pay rates and changes in public utility rates. That differentiation was not whimsical. It was based on excellent practical and economic reasons which the Board now ignores (Pet. Br., pp. 33-37).

2. The Board asserts that "the Act embodies substantially the same rate-making method" for determining mail pay and public utility (*i.e.*, passenger and cargo) rates (Res. Br., p. 27). Actually, the differences in the "method" are legion.

Airlines do not set and cannot change their mail pay rates. But they can and do set their public utility rates, simply by filing tariffs which they can change at will. The Board has only a supervisory action over those rates. It can suspend them and, when need arises, revise them. Even then it may always (and sometimes must) prescribe only maximum and minimum public utility rates, whereas it fixes specific mail pay rates. Most important, public utility rates can be changed only prospectively. Mail pay rate changes can be made retrospectively and prospectively.

3. The Board says that "petitioner asserts that the standards for determining mail rates are so different from those for determining rates for the carriage of persons and property as to make inapposite rules for the fixing of typical public utility rates" (Res. Br., p. 25). We said nothing of the sort. Had Congress wished to apply to mail pay the "typical public utility rate" rule that changes are made only for the future, of course it could and would have done so, however different the "standards" used to determine the rates. What we said, and repeat, is that the difference in the standards is an additional fact point-

ing up the fallacy of analogizing §406 to public utility rate statutes.

The Board admits that the so-called "subsidy" provision of §406(b) differentiates §406 from such statutes (Res. Br., p. 27). Thus, tariff rates are to be "at the lowest cost consistent with the furnishing of such service," §1002(e)(2), and "to provide adequate and efficient air carrier service," §1002(e)(5). Mail pay, on the other hand, is to be high enough, with all other revenue, to enable the airlines to maintain and develop a national air transportation system, §406(b).

The Board says that the reason why "the last clause of Section 406(b) is sometimes called a 'subsidy' provision is that it relates to the fixing of mail rates, rates which are only applicable to a single customer, the United States" (Res. Br., p. 28, note 18). That is incorrect. Railroads carry mail for the same single customer. "In the case of the railroads," however, "there has been no hint of subsidy in connection with mail payments."[33] The real reason is quite different.

Congress "knew that in the present developmental stage of the air transport industry the air carriers, in most instances, would be unable to survive without revenues from the transportation of mail sufficiently large to make up for the deficiency in revenues from passenger and express sources."[34] (Hopes that the airlines would become

[33] See *Hearings before a Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st Sess.* (hereinafter referred to as "*Subcommittee Hearings*"), p. 45. See also, *infra*, notes 39 and 40.

[34] *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 253. See also *infra*, note 39.

self-supporting without liberal mail pay have still not materialized.[35] Hence Congress provided that air mail pay should be "compensation not only for carrying the mail but for building up a system of air transportation which will serve the nation's commerce and security as well," and "the medium through which continuous financial support necessary for the carriers to fulfill the purposes of the Act is extended."[36] For that reason it is sometimes called a "subsidy."

Whatever the terminology used, the fact remains that, as the Board has pointed out time and again (see Pet. Br., pp. 37-40), radical differences exist between the Act's mail

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[35] *Cf.* the *Message of the President of the United States*, H. Doc. No. 17, 81st Cong., 1st Sess., on January 10, 1949, referring to the postal deficit (95 Cong. Rec. 154-155):

> "The remaining deficit would represent largely the costs of Government penalty mail, franked mail, *airline subsidies, and other costs not properly chargeable to the users of the postal service*. Aside from such costs, postal operations should be conducted on a self-sufficient basis, with rates maintained at a level adequate to accomplish that objective.
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> "Aviation: *Commercial aviation, the newest of our transportation industries, is still in a stage of development that requires subsidy assistance.*"

[36] *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 324, 330, 335. "In determining mail rates, under section 406 of the Act, allowance is made not only for the expenses and revenues incident to the operation of schedules required in the interests of the Postal Service, but also for the expenses and revenues incident to the operation of all additional schedules found to be required by the interests of commerce or the national defense, or both." *Braniff Airways, Inc.—Mail Rate Proceeding*, 2 C. A. B. 555, 559. Indeed, mail service can be authorized solely in the interests of national defense. See *Pan American Airways Company—Temporary Certificate of Public Convenience and Necessity*, 3 C. A. B. 47, 48; *Chicago Southern Air Lines, Inc.—Mail Rates for Route Nos. 8 and 53*, 3 C. A. B. 164, 194.

pay "standards" and those applicable to public utility rates. Those differences furnish additional proof that the analogy to public utility rate statutes is askew.

B. The Legislative History.

1. Until 1938, when the Act was passed, the air transportation industry was largely unregulated. Only a few years before, in 1934, Congress had rejected as premature a proposal for comprehensive regulation of air transport.[37] Naturally, in providing for control of passenger and cargo rates, the issuance of certificates of public convenience and necessity, and the like, Congress drew heavily on its experience in regulating other forms of transportation. On those subjects, it had no prior experience in regulating airlines. Hence many provisions of the Act "bear a striking similarity" to statutes regulating other transportation activities (Res. Br., p. 24).

Because the industry was to be placed under sweeping governmental control, like other industries, several people commented on the fact. It is very easy, therefore, to cull general statements having nothing whatever to do with mail pay, and present them, out of context, as if they bore on that subject or even on the specific problem here involved (*e.g.*, Res. Br., pp. 22-24, 32, 59).[38]

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[37] Senator McCarran's 1934 bill, referred to in Pet. Br., p. 67, note 88, contained a comprehensive scheme for regulation of the entire industry.

[38] For instance, the Board points out (Res. Br., p. 59) that Senator Truman said of the 1937 bill: "This bill is simply a regulatory measure which does for the air carriers exactly what is done for railroads and for busses and trucks. I cannot too strongly emphasize that fact." 81 Cong. Rec. 9201. Plainly all he meant was that airlines, like railroads, busses and trucks, were to be com-

Actually at no time did anybody state that the *mail pay* provisions of the Act—much less what is now the "make effective" clause of 406(a)(1)—embodied or were intended to embody any public utility doctrine. The reason is plain. Congress had been regulating mail pay rates since 1792. It had no need to look for guidance on that subject to doctrines developed in the field of public utility rate legislation. The Act's mail pay provisions were an evolution from Congress' abundant experience with mail pay.

2. Then the Board notes that the Act does not provide for direct, outright subsidies (Res. Br., pp. 28-29). Admittedly, however, it contains an indirect "subsidy" provision. The veiled intimation seems to be that the only alternative to a direct subsidy statute is a prospective public utility rate-making system. The unsoundness of that dilemma is too obvious for discussion.

3. Next the Board says that in 1937 witnesses "pointed out the similarity between the problem of fixing mail compensation for air carriers and fixing railroad rates" (Res. Br., p. 30) and the "analogy to rate-making for railroads"

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pletely regulated by the Commission; in other words, that in addition to having "the power of fixing rates for mail," the Commission would be empowered to "fix the rates for passengers, freight, and express." See his comment in *Subcommittee Hearings*, pp. 280-281. Yet this innocuous generality is pieced together with an earlier generality relating to air mail, which manifestly called attention simply to the fact that the 1937 bill was intended to change the peculiar system under the Air Mail Acts (under which the Postmaster General and the Commission had divided authority over mail pay, with a Commission-fixed rate being superimposed on a contract-fixed rate, subject to a statutory ceiling) to one under which all authority over air mail rates would be reposed in the Commission, "just as mail on railroads is treated." 81 Cong. Rec. 9202.

(Res. Br., p. 31). Apparently one is supposed to infer that the witnesses thought that railroads and airlines occupied the very same situation, and therefore that air mail pay should be treated in exactly the same way as "railroad rates," *i.e.*, passenger and freight rates.

No witness suggested any such thing. On the contrary, the witnesses made it plain that railroads and airlines occupied quite different situations, even with respect to mail transportation.[39] In fact, the Board quotes bits

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[39] In *Subcommittee Hearings* and *Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 5231*, p. 35, Commissioner Eastman pointed out one profound difference between the situation of the airlines and that of the railroads with respect to mail pay. He said (*Subcommittee Hearings*, p. 35):

> "In the case of air carriers, however, the mail service is a far more important factor than in the case of the railroads. The air lines claim, and probably up to the present time it has very largely been true, that they were created for the purpose of carrying mail, that it is their primary and essential function, and if they are to carry the mail efficiently and successfully they argue that the compensation for carrying the mail must make it possible for them to operate at a profit. The result of following this argument to its logical conclusion is similar to the result of a direct Government subsidy, because the Government's payment for carrying the mail will then insure profitable operation—always assuming efficient and economic management, of course, which the Commission would take into consideration.
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> "Whether or not this ought to be done is a matter of policy for Congress to determine. I wish to point out, however, that the present bill [*i.e.*, the original 1937 bill] is so drawn that it opens the door to this argument."

Mr. Gorrell also pointed out that mail was "still the mainstay of most airlines." *Ibid.*, p. 134. "It is expressly provided that the Commission will not be required to follow the method adopted in the case of the railroads, which has been purely a space method, as I understand it. The Commission must take into consideration the conditions of aircraft transportation." *Ibid.*, p. 137. See also his testimony quoted in Res. Br., p. 66, note 59.

of testimony intended to illuminate *differences* between the 1937 bill and the Railway Mail Pay Act over the use of mail pay as a "subsidy."[40] That testimony was designed to demonstrate that experience showed that no rates can ever be fixed in a vacuum, and that if the airlines were to earn enough total revenue to keep going, but could not derive a livelihood from carrying passengers and freight, mail rates would have to be fixed high enough to make up the difference.[41] It passes understanding how this testi-

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[40] Some of Commissioner Eastman's testimony in this respect was quoted in Pet. Br., p. 73, note 109. In addition, he prefaced that part of his testimony from which disjointed excerpts are quoted in Res. Br., p. 30, by saying (*Subcommittee Hearings*, p. 74):

> "These bills [both of them, follow *quite largely* the language in the present railway mail pay acts under which the Interstate Commerce Commission fixes compensation for carrying railway mail. *There are certain differences, however*, which were pointed out in the report which we have filed on S. 2, and *which I will endeavor to discuss a little more explicitly at this time.*"

The "report which we [*i.e.*, the Commission] have filed on S. 2" (*i.e.*, the original bill, not the substitute bill which we will call the "1937 bill," as in our main brief) had noted: "In the case of the railroads there has been no hint of subsidy in connection with mail payments." *Subcommittee Hearings*, p. 45. At the hearings, Commissioner Eastman developed the point further. See *supra*, note 39, and *infra*, note 41.

[41] This clearly appears from the testimony of Commissioner Eastman, quoted in truncated form in Res. Br., p. 30. After the statement quoted *supra*, note 39, he said that "in the substitute [*i.e.*, the "1937 bill"] you will note there is continual emphasis upon transportation of the mail" and "provisions indicating that rates must be so fixed that the carriers can operate successfully. If the rates for carrying passengers and property other than mail cannot, as a practical matter, be fixed at a level which will enable them to do their share in producing these results, then the burden must, it will be argued, fall on the mails." *Subcommittee Hearings*, p. 75. He added: "I am not so sure that that is to be regarded as a subsidy."

mony can be offered as remotely indicating that a limited meaning should be given to the "make effective" clause, which had not even been proposed at the time.

4. Of course, as the Board argues (Res. Br., pp. 36-37), Congress *could* have disregarded the historical differentiation between mail pay adjustments and public utility rate changes, ignored the practical reasons underlying that difference, and tossed into the discard generations of experience in the fixing of mail compensation for the past as well as the future. Presumably, however, in a mail pay provision Congress acted with regard to the conditions peculiar to mail pay and its past experience with that field. Presumably it did not draw a false analogy to the alien field of public utility rates.

There is no need, however, to rely on presumptions. Apt language to assimilate completely the fixing of mail

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Ibid. Then he proceeded to develop this point by an analogy. "It is a good deal like the situation with respect to the railroads. There the most important part of the service is the freight service, and . . . the railroads . . . have frequently argued to the Commission that it is impossible for them to get a fair return on the passenger business, and therefore the freight must carry that load, if they are to get the fair return; in other words, that the deficit from passenger service must be fastened on the freight service. To some extent the Commission has accepted that argument. I say 'to some extent' because in the case of the carriage of livestock, for example, it found that it was not an appropriate place to put that burden, and that the railroads should find some other place to carry that burden, other than the carriage of livestock. The situation is much the same here. Of course the Government wants the mail to be carried efficiently and well. If it should be the situation that for competitive and other reasons the passenger part of the business cannot be made to pay its way, then it follows that the companies cannot operate successfully in a financial way unless they get enough from carrying the mail to cover the deficiency on passengers." *Ibid.*, pp. 75-76.

pay to public utility rate doctrines lay at hand in this very statute. Congress could have chosen the same standards for fixing mail pay as for determining public utility rates. It did not. It could have provided that mail rates, like public utility rates, should be changed only prospectively. It did not. On the contrary, it used in § 406(a)(1) unique language vastly different from that of public utility rate statutes. That language cannot be emasculated by appealing to a false analogy which Congress did not follow when drawing this very Act.

III. The "Legislative History" of the "Make Effective" Clause.

The Board tries to pare down § 406(a)(1) by invoking its legislative history. "There is, however, no ambiguity in this Act to be clarified by resort to legislative history." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492. The argument, moreover, is fruitless. What the legislative history shows is that the "public utility" notion that mail pay rates should be changed only prospectively was vigorously advanced and rejected decisively. Instead Congress wrote into the Act a broad grant of power without any arbitrary limitations.

A. The Obligation to Carry the Mails.

Claiming that the 1937 bills (and the Act) imposed no obligation to carry mail, the Board persists in its basic premise that the "disagreement in the Commission" over its power under the Air Mail Acts to fix rates back to the date the proceeding was begun "would have been perpetuated had the 1937 bills been enacted into law without

the addition of the "make effective' clause" (Res. Br., p. 68). It admits that Commissioner Mahaffie predicated his dissenting view wholly on the argument that under the Air Mail Acts airlines were not required by law to carry the mail. (Res. Br., p. 65).

The Board's claim is unsound. It is entirely immaterial whether an airline can legally operate without carrying mail.[42] The problem whether air mail rates can be fixed retrospectively or not can never arise with an airline lacking authority to carry mail, for it may not carry mail at all. No airline may carry mail unless specifically authorized to do so by certificate.[43]

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[42] The 1937 bill provided, in §305(g): "No certificate shall be issued, and no air carrier shall hold, or operate under, *any* certificate, except upon condition that the carrier shall undertake to provide, under such rules and regulations, not inconsistent with the provisions of this part as the Postmaster General may prescribe, necessary and adequate facilities and service for the transportation of, and to transport, mail, whenever so authorized by such certificate and so required by the Postmaster General; and such carrier shall be entitled to receive compensation therefor as hereinafter provided." *Subcommittee Hearings*, p. 23. Perhaps it might be inferentially implied from §305(f), which referred to a certificate including "authority to transport such classes of traffic, except mail, as may be approved by the Commission," that an airline might be issued a certificate authorizing it to operate although not obliging it to carry mail. For the corresponding provisions of the original 1937 bill, see *Subcommittee Hearings*, p. 4.

[43] The 1937 bill provided, in §305(a): "No air carrier shall engage in interstate, overseas, or foreign air transportation or in any transportation of mail by aircraft, unless there is in force a certificate issued by the Commission authorizing such carrier so to engage." *Subcommittee Hearings*, p. 22. The corresponding provision of the Act is §401(a), 49 U. S. C. §481(a): "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." In the Act "air transportation" means "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft," §1(10), 49 U. S. C. §401(1).

While such a certificate is in existence, the airline has no choice about carrying mail. "Whenever so authorized by its certificate, any air carrier *shall* provide necessary and adequate facilities and service for the transportation of mail, and *shall* transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided."[44] If it violates that duty, it is liable to a heavy fine for each day of the violation.[45] Once a certificate is issued, it cannot be voluntarily abandoned.[46]

After an airline occupies the status of a mail carrier, therefore, it is compelled to carry mail. That the status was not forced on it originally is beside the point. Nobody can be legally forced into the status of marriage, but a man who marries is compelled to support his wife whether

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[44] Section 401(m) of the Act, 49 U. S. C. §481(m). The corresponding provisions of the 1937 bills are set out *supra*, note 42. "Air carriers transporting or handling United States mail *shall* submit, under oath, when and in such form as may be required by the Postmaster General, evidence of the performance of mail service," §405(j), 49 U. S. C. §485(j). For corresponding provisions, see §311(f) of the original 1937 bill, *Subcommittee Hearings*, p. 10, and §310(h) of the amended 1937 bill, *ibid.*, p. 29.

[45] For a first offense, the fine can be $500; for each subsequent offense, $2,000. "If such violation is a continuing one, each day of such violation shall constitute a separate offense," §902(a) of the Act, 49 U. S. C. §622(a). For the penal provisions of §316(a) of the 1937 bills see *Subcommittee Hearings*, pp. 13-14, 31.

[46] Section 401(k) of the Act, 49 U. S. C. §481(k), provides: "No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest." Similarly, a certificate cannot be revoked except for "wilful" violation of law; §401(h), 49 U. S. C. §481(h). The 1937 bills contained no express provision relating to abandonment of a certificate.

he wants to or not. Moreover, under §401(n) of the Act, once an airline accepts a certificate permitting it to carry only passengers or cargo or both, but not mail, it subjects itself to the obligation of carrying mail if the Board subsequently finds that it is in the public interest.[47]

No one had any doubt that under the 1937 bill an airline authorized to carry mail would be compelled to act as a mail carrier. Mr. Gorrell made that clear.[48] He even took the position that the airlines' duty to carry mail was *broader* than that of the railroads.[49]

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[47] Under Section 401(n), upon certification by the Postmaster General that new air mail service is needed, the Board has the power to provide for it by issuing a new certificate "or by amending an existing certificate or certificates in accordance with the provisions of this section." "This section" [§401(h)] provides that the Board, on its own initiative, may amend any certificate if the public convenience and necessity so require. Consequently once an airline accepts any kind of a certificate it immediately subjects itself to the obligation of carrying the mail if the Board wishes to require it, whether its original certificate provided for it or not.

[48] "Thus, when a carrier is authorized in his certificate to carry mail, he assumes an *absolute obligation* to transport that mail as and when directed by the Postmaster General, and under rules and regulations made by the Postmaster General." *Subcommittee Hearings*, p. 436. "Since the *obligation* placed upon the carriers by section 305(g) to furnish adequate and necessary mail service is one of the obligations imposed by the act . . . the criminal penalties for violations of the act are likewise applicable." *Ibid.*, p. 463.

[49] "On the other hand, with respect to the mail service, section 305(g) says specifically that the carrier must transport the mail 'whenever . . . required by the Postmaster General.' It also provides that adequate service must be given under the Postmaster General's rules and regulations. *This is a power much greater than that which he possesses with respect to the railroads.* As to them it is provided merely that a railroad company must transport mail 'when required by the Postmaster General on any train or trains it operates.' That is taken from 39 U. S. C. A. section 539." *Subcommittee Hearings*, p. 442.

Thus, even without the "make effective clause," the 1937 bill completely cut the ground from under Commissioner Mahaffie's dissenting argument. The point on which he disagreed with the Commission could have arisen only when an airline was lawfully carrying mail. Under the 1937 bill, every such airline was placed under a penal, statutory duty to carry mail.

Not even Commissioner Mahaffie could have made the arguments against all retrospective adjustments of mail pay advanced in his dissent in *Air Mail Compensation*, 216 I. C. C. 166, 192. No longer could he have continued to argue that "carriage of the mail by railroads is required by law. Refusal is punishable by a fine," whereas "air mail is carried by contractors. The air line is under no compulsion to become a contractor. It may, on 60 days' notice, terminate its contract, and end its undertaking to carry mail." The 1937 bill abolished the whole system of a voluntary contractual relationship. It substituted a compulsory, non-terminable status relationship enforceable by criminal penalties. The Board's basic premise is completely unsound.[50]

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[50] It is unnecessary to explore the Board's attempt (Res. Br., p. 64) to show that the 1937 bills did not eliminate the "minutiae of expression . . . that show Congress to have been thinking of the future" carried over into the Air Mail Act from the Railway Mail Pay Act. They are apparent from a comparison of the statutes (Pet. Br., pp. 49-51, 59-61). Indeed, reenactment of the statute without change would have been an acceptance by Congress of the Commission's settled construction "which had been so clearly brought to its attention". *United States* v. *Zazove*, 334 U. S. 602, 623; *cf. Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 449-450.

B. The Broad Disagreement as to the Commission's Retrospective Power to Fix Mail Rates.

1. The Board thinks that under the Air Mail Acts the only disagreement in the Commission was over "the narrow question of whether the Commission had authority to fix mail rates back to the date of the petition or whether it was restricted to making such rates effective from the date of issuance of an order" (Res. Br., pp. 69-70). There are two errors in this position.

First, the Board does not cite a single case to support its intimation that, under the Air Mail Acts, the Commission held or said that it could go back *only* to the date of the petition. Actually it went back even further.[51]

Second, in all the cases where the Commission did fix rates back of the date of the petition, Commissioner Mahaffie dissented. He predicated his first dissent on the broad ground that the Commission had "no authority in

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[51] The Board dismisses certain decisions reviewed in Pet. Br., p. 58, note 72, on two grounds. First, the retrospective "action was taken by the Postmaster General and not the Commission" (Res. Br., p. 54, note 40). The mechanics of the retrospective adjustment are immaterial. The important thing is that under the statute the Commission had power to issue orders which were made effective far back of the start of the proceeding. Had the Postmaster General doubted the Commission's authority to make such orders, he would have refused to pay thereon, as in the *New York Central* case. Second, it suggests that the action was "*apparently* based on Section 6(c) of the Air Mail Act of 1934, as amended." Nothing in that section required that compensation under a revised Commission-fixed rate be adjusted retrospectively as far back as March 1, 1935 (*cf.* Pet. Br., p. 57, note 71), and the action taken shows a liberal interpretation of the section standing in sharp contrast to the Board's present narrow view of §406(a)(1).

the act for making the increases retroactive,"[52] and continued that position throughout.[53] In other words, he took the view that the Commission should fix rates only for the future, just as under public utility rate statutes.[54]

2. The Board concedes that disagreement was voiced by "witnesses and legislators" during the 1937 hearings over the broad principle whether the Commission had any power to fix rates retrospectively, not over the narrow question here involved (Res. Br., pp. 70-71). It suggests that the argument somehow "became narrowed" and then Mr. Gorrell "resolved the issue." The fact is that all

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[52] *Air Mail Compensation*, 216 I. C. C. 166, 191. "By construction, the majority import into the statute a power contrary, in my opinion, to its express terms." *Ibid.*, p. 192.

[53] The discussion (Res. Br., pp. 68-69, note 62) of *Air Mail Rates for Route No. 33*, 216 I. C. C. 381, ignores the very first sentence of the dissent: "As I pointed out in my separate expression in Air Mail Docket No. 1, decided June 6, 1936 [*i.e.*, *Air Mail Compensation*, 216 I. C. C. 166, 191, *supra*, note 52] *I find nothing in the law under which we operate that authorizes us to prescribe compensation retroactively*" (p. 403). Perhaps Commissioner Mahaffie was wrong in not agreeing with the Board that the 1935 Act "specifically conferred power to fix rates back to March 1, 1935," but that is what he thought. The discussion of the dissent in *Air Mail Compensation*, 222 I. C. C. 602, 610, puts words into Commissioner Mahaffie's mouth. He did not refer at all "to the date a petition was filed" (Res. Br., p. 69, note 62). "The chief question here is whether, under the terms of the act, we are authorized *retroactively* to change rates of compensation previously determined by us and paid by the Postmaster General. For the reasons stated in my separate expression in 216 I. C. C. 166, 191, I am unable to agree that we have that power" (italics the Commissioner's). Nor is there any reason to suppose that, because he did not discuss the *merits* of the change effected by the retrospective addition of the proviso, he ignored that phase of the majority's holding.

[54] In *Air Mail Compensation*, 216 I. C. C. 166, 192, he relied on a case dealing with public utility rate changes.

he did was to concentrate, for tactical reasons, on that one aspect of the "general problem of retroactivity" on which he had a decision of this Court to support him, whereas on other phases he could rely only on the general reasoning which he also advanced (Pet. Br., p. 70, note 104). No person can unilaterally "resolve" a broad question previously raised by others. None of Mr. Gorrell's adversaries receded from or "narrowed" their broad position. After he finished testifying, the debate remained, as before, one over the general principle of prospective vs. retrospective rate-fixing.

So, too, the Board is simply wrong in saying that Mr. Gorrell "expressed an intention to grant the Commission authority to make its mail orders effective as of the date a mail rate proceeding was initiated, *and nothing more*" (Res. Br., pp. 61-62). Neither he nor anyone else at these hearings ever said that the Commission had or should have only such limited power. He expressly referred to authority to fix "appropriately" the effective date of its rate decisions. For all that appears, he had in mind the fact that, since the 1937 bill omitted the specific provision whereby rates were fixed retrospectively to March 1, 1935, a past date which Congress had deemed appropriate, it would be desirable to replace it with a general provision preserving like broad power to go back retrospectively to a past date which the Commission determined to be appropriate.

If Mr. Gorrell had half the keen powers of discrimination with which the Board credits him, it must have been obvious to him that the power "to make such rates effective from such date as it shall determine to be proper" was palpably broader than the limited intention now foisted on

him. He did not have to add, "this language means just what it says." But the point is not worth further discussion. It is a novel theory indeed that the broad, clear language of a statute can be vitiated by ascribing to Congress in 1938 a narrow "intention" derived in turn by imputing it, by a process of divination and speculation, to a private witness who testified in 1937 on a bill which never even came to a vote.

C. The "Legislative History" After the 1937 Hearings.

The Board says that Mr. Gorrell "is the only person who ever explained or even commented on the 'make effective' clause during the entire legislative consideration of the Act" (Res. Br., p. 62). Nonetheless it struggles to make it appear that its interpretation of what he meant received an official accolade, *sub silentio*, in 1937. To do this, it tears out of context utter generalities having nothing to do with the "make effective" clause (Res. Br., p. 5[illegible]).[55]

Then the Board makes the fanciful argument that all of Mr. Gorrell's testimony was "incorporated by reference" during the 1938 hearings (Res. Br., p. 63). While it would not make any difference if the fact were as stated, actually all he said in 1938 was that he would not cover the points covered the previous year—which comprised over 200 pages of varied comments. There is nothing to show that any member of Congress ever referred in 1938 to the 1937 Gorrell testimony. In short, the Conference Report (Pet. Br., p. 45) is the only expression by Congress on 406(a). While the Board tries to dismiss it as a

[55] These generalities have been noted before (Pet. Br., p. 72, notes 107 and 108; *supra*, note 38).

"generality," it certainly shows that the section was taken at its full face value.

The legislative history proves that the "make effective" clause means just what it says.

IV. The Board's Previous Rulings.

From the outset the Board has regularly fixed mail rates for the past. Often it has been as occupied with fixing rates for past periods, frequently covering several years, as in fixing future rates.

Never before did the Board deny that it had the power to fix rates back of the date of the proceeding. Even if it had never exercised that power, its inaction would not show that the power was non-existent.[56] Actually, however, it has invoked that power repeatedly (Pet. Br., pp. 85-98).

That the Board did not say forthrightly that it was deviating from its "general policy" is immaterial. Actions speak louder than words. Power is not wielded any the less because its exercise is cloaked by using magic words like "temporary," or "provisional,"[57] or "system,"[58] or

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[56] "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." *Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352; *United States* v. *American Union Transport, Inc.*, 327 U. S. 4[illegible] 455, note 18. *Cf. The Mail Divisor Cases*, 251 U. S. 326, 332-335.

[57] This was the abracadabra employed in *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), mentioned in Pet. Br., p. 86, note 127. There the Board held it had power to go years back of the filing date of the petition to supersede a contract rate which had been in effect all along.

[58] In *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, the Board found that since the airline had received "excess earnings" on its other routes "which greatly exceeded the

by resorting to polite fictions in "reopening" proceedings and issuing "amended" or "revised" orders, or deeming a petition filed "*nunc pro tunc*" a date earlier than its actual filing.[59]

In §406(a)(1) the Act confers on the Board, in plain English, ample power to reach directly all the results which it now feels obliged to justify by fictions and charmed words. When one looks to what it has actually done, it is perfectly manifest that it has repeatedly exercised that power. It is hardly surprising that, even after this pro-

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requirements of the Alaska division, respondent had no 'need' for which it may be paid additional compensation" (p. 67). Nonetheless, because it decided not to set rates for the new Alaska operations on a "system" basis, it held that "we cannot refrain from fixing the minimum compensatory rate in this proceeding on the ground that such earnings exist elsewhere" (p. 68). When the Board wishes to fix rates on a "system" basis, however, it feels at liberty to give the airline nothing for carrying mail on the new route when it thinks it has earned too much mail pay on the old routes. See Pet. Br., p. 94.

[59] The Board struggles (Res. Br., pp. 78-79) to explain away its 1942 memoranda (discussed in Pet. Br., pp. 87-88). Presumably it preferred not to say bluntly that it was making an exception to its "policy" because it thought that, if it did so, airlines might misinterpret its action as encouragement to apply for retrospective relief on baseless grounds. No matter why it favored indirection, however, the fact remains that the Board invited airlines to file petitions asking for relief which it now says it could not lawfully grant. Its present "fair play" argument is irrelevant to the question of power. "It is beyond the judicial power to distort facts or to disregard legislative intent in order to provide equitable relief in a particular situation." *Bochm* v. *Commissioner of Internal Revenue*, 326 U. S. 287, 295. Administrative power is hardly greater than judicial power. Moreover, the Board's arguments have no possible application to *United Air Lines Transport Corp., Mail Rate Proceeding*, 3 C. A. B. 289 (discussed in Pet. Br., p. 89), where the same *nunc pro tunc* device was employed. The Board ignores that decision.

ceeding was begun, the Board's own Public Counsel flatly stated "the Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding" (see Pet. Br., p. 24).

V. The Board's Policy Arguments.

The Board's brief is heaped with policy arguments designed to show that Congress should not have given it the broad power to make mail pay rates "effective from such date as it shall determine to be proper" after hearing all the facts. "But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44. Fundamentally the Board's quarrel is with the policy expressed in §406(a)(1). "But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy." *Hilton* v. *Sullivan*, 334 U. S. 323, 339. The policy arguments are, moreover, untenable as well as irrelevant.

A. The "Waste of Time" Argument.

The Board asserts that, unless the "make effective" clause is whittled down as it proposes, the whole "rate-making method . . . would be completely eliminated" (Res. Br., p. 39). A contrary view, it protests, would "render meaningless the work of the Board in this field for the past ten years" (Res. Br., p. 17), for the Board hardly "would expend time, effort, and money to fix future rates" if the Act required it "to replace all such determinations [*i.e.*, its future rate prophecies] with the results

taken from audits after the facts became known" (Res. Br., p. 82). Indeed, the "rate-making process would lose all significance" (Res. Br., p. 85).

Underlying this rhetoric are several glaring fallacies.

1. All the Board's mail pay rate predictions need revision sooner or later. When they are revised, necessarily the Board looks to the results of past operations.[60] But it does not merely replace one rate prophecy with another, as a public utility rate-fixing body must do because of practical exigencies. For the choice is not, as the Board contends, between leaping from prophecy to prophecy and abandoning the entire effort to fix future rates as a waste of time. There is a middle ground between those two extremes, and the Board occupies it right now.

When a mail rate prophecy is superseded, it is not "replaced" merely for the future. Concededly the Board replaces it for the past as well, by a retrospective adjustment of mail pay for the period back to the start of the proceeding. Its determination is, of course, based on "the results taken from audits after the facts became known." Yet the rate-making process does not go up in smoke, or become a waste of "time, effort, and money."

In short, the dilemma propounded by the Board is false. Rather the issue is whether, when superseding a prophecy as of a past date, the Board's hands are tied so that it is limited to going back to the day when the proceeding starts, or whether it is free to go back to the time when

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[60] "In fixing a rate for the future, however, we must necessarily consider the results under existing rates during the past, and whether there be a deficiency, a just profit, or an excess profit, we look at the results for guidance in redetermining the rate." *Braniff Airways, Inc.—Mail Rates for Routes Nos. 9, 15 and 50*, 3 C. A. B. 633, 636.

the rate actually became unreasonable. The Board's rhetoric only obscures that issue.

2. If the Board's prophecies were always as wide of the mark as the rate involved here (Pet. Br., p. 12, note 4), it would be eminently sensible to abandon the entire effort to set future rates. But there are excellent reasons why it is not a waste of time and money to fix rates for the future.

Airlines need mail pay to keep operating. They are paid by the Postmaster General, and his only authority for making payment appears in §406(a)(3), which provides that "the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft."[61]

Hence "under the Civil Aeronautics Act, the Post Office Department cannot pay for mail service rendered by an air carrier except upon an order of the Board fixing and determining a rate of mail compensation."[62] "In the absence of any mail pay the cost of the mail service necessarily dissipates the respondent's available working capital."[63] Manifestly it would not be a waste of the Board's "time, effort, and money," therefore, to fix a future mail rate, if the "make effective" clause is taken at its face value.

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[61] 49 U. S. C. §486(a), quoted in Pet. Br., p. B9. This is the only general mandate to the Postmaster General.

[62] *Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 689. See also *American Overseas Airlines, Inc., Mail Rate*, 7 C. A. B. 623, 625, and the cases cited *infra*, note 63.

[63] *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 425; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 619.

Only by fixing such a rate could the airline get the mail pay currently needed to enable it to perform the service which is to fulfill the Act's objectives.

3. But the errors in the Board's argument go far deeper. If the "make effective" clause is given its plain meaning, the Board would not have to "replace all such determinations" (*i.e.*, its rate prophecies) "with the results taken from audits made after the facts became known" (Res. Br., p. 82). It would have to do that only if its prophecies were invariably wrong—in which event it certainly would be absurd to spend much time formulating them. So long as a rate prediction remained within the broad "zone of reasonableness," it would need no replacement. Hence there would be real point in making a careful effort to fix a fair future rate, instead of picking a figure out of thin air.

4. Another variant of the Board's argument is that all the Board's future rates would become "merely tentative" or "tentative determinations" (Res. Br., pp. 41, 49). But the Board does not deny that it has *power* to set "temporary" rates for any and all airlines. Indeed, in 1942 it proposed precisely that procedure for the entire industry.[64] It did not think then that the "rate-making process" would thereby lose "all significance." Nor does it lose its "significance" or become "meaningless" now, when many rates

[64] In its 1942 memorandum, quoted in Pet. Br., p. 99, it proposed that "all rates effective on and after the date of the change-over to the new service pattern should be temporary in character, and should be subject to review and adjustment as to such period as experience may show the necessity for adjustment after a reasonable period of time."

are avowedly "temporary" and revised retrospectively for many years.[65]

From a policy standpoint, a system of purely "tentative" rates would be preferable in this industry to one of sacrosanct "final" future rates, if choice had to be made between those two extremes. Actually no such choice is required. Once again the Board is posing a fictitious dilemma.

A "temporary" rate reflects a quick, tentative estimate. No one has to prove that it should be revised. It shows on its face that revision is expected. Even when events reveal, when it is up for revision, that it came within the "zone of reasonableness," it is entitled to no weight. Since it was a purely provisional guess, it has no real probative significance. Hence the "temporary" rate need not be accorded any respect, and the definitive rate may be placed anywhere within the zone of reasonableness that the Board determines proper.

When a definitive rate is set, however, the Board may act quite differently. It need not treat it as casually as a tentative estimate. It may, for example, accord it a presumption of fairness. It may impose on an unduly

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[65] The "temporary" rate fixed on October 18, 1946, in *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, retrospectively as of February 5, 1946, provided that the proceeding would remain open until the Board fixed "a final rate retroactive to February 5, 1946, which said final rate may be higher or lower than the temporary rate fixed herein" (p. 426). Three years have gone by and no "final rate" has been fixed. Admittedly when the Board comes to fix that "final rate" it will have to examine *all* TWA's revenues from all its routes back to February 5, 1946 (Res. Br., p. 76, note 68). Yet it maintains that it is limited to examination, as far as the rates on the domestic routes are concerned, and is powerless to adjust those rates in accordance with the results of its examination.

dilatory petitioner the burden of proving the rate's unfairness.[66] If the facts show that the rate was within the zone of reasonableness, it may decline to revise it retrospectively. Indeed, it may exercise its discretion that way even though, if it were fixing the rate for the first time, it would choose a different figure within that zone.

Thus it simply is not true that the Board's predictions must be regarded as infallibly correct, up to the start of a new proceeding, or else become completely meaningless or merely "tentative" estimates. The time when a rate becomes unfair does not depend on the accident whether a rate proceeding is pending when it ceases to be fair. If that time falls while a proceeding is pending, admittedly the Board has power to adjust the rate back to the date when it actually became unfair. Congress decided that the Board should have equal power to make the same adjustment, as of the same date, whether or not a proceeding chanced to be pending then. The "make effective" clause confers precisely that power.

B. The "Finality" Argument.

The Board says that its concededly retrospective rate adjustments "do not destroy the finality of previous orders," cover only the limited time necessary to determine a new

[66] In *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), the Board held it had power to fix a rate higher than that provided in a contract, and make the increase effective back to January 1, 1943, although the petition was not filed until September 4, 1945. But it was not "unmindful of the fact that the carrier waited such a long time to file its petition" and had not "expressed its dissatisfaction" sooner. Accordingly, it held that "the carrier must shoulder the burden of coming forward with proof of the inadequacy of the compensation it has been receiving to the time of its filing a petition," and that "the Board will scrutinize meticulously the evidence with respect to the period prior to the filing of the petition."

rate, and are normally accompanied by" a future rate (Res. Br., p. 15).

If the "make effective" clause is construed according to its terms, the retrospective rate will "normally" be accompanied by a future rate. The Board's reference to the "limited time necessary to determine a new rate" can hardly have been intended seriously. Its retrospective adjustments often are made for two or three years, and even longer. Moreover, as already seen, the Board always looks to the experience of the past. The sole question is whether it is confined to looking at that part of the past which precedes the filing date or whether it may also act on it in appropriate cases.

As for the "finality" point, little need be added to our previous discussion (Pet. Br., pp. 74-77).[67] Whenever the Board supersedes a rate retrospectively, it destroys its "finality" for the past *pro tanto*. Whether it is willing to face the fact or not, it *does* retrospectively "superimpose

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[67] The Board makes no effort to support the fictitious presumption against "retroactivity" relied on below, but suggests that the Court was "simply drawing an analogy between the uncertainty created by" a retroactive statute "and the uncertainty created by TWA's interpretation of this statute" (Res. Br., p. 41, note 30). The Court drew no such analogy, and none exists. Interpreting §406(a)(1) correctly creates no "uncertainty." In this field, future rates necessarily are extremely uncertain guesses. Had Congress wished to confer on them a fictitious infallibility, it would have frozen them for a limited time, like railway mail pay rates. Certainly it would not have used the broad language of the "make effective" clause.

The Board's "protective petition" discussion (Res. Br., pp. 90-93) completely misses the point. Whether such petitions have been, should be or will be filed frequently has nothing to do with the indisputable fact that the Act permits them to be filed, showing that no "finality" is accorded to future rates. Moreover, the Board ignores the fact that, by terming a rate "temporary," it can always destroy its "finality."

new rates on rates previously and finally fixed" (Res. Br., p. 85). Doubtless public utility rates have a kind of "finality," in the sense that they are not changed retrospectively (Res. Br., p. 34). That is not because there is some virtue in inflexibility, but because of the necessity resulting from the exigencies of the situation, which simply do not exist in the case of mail pay (Pet. Br., pp. 33-36). Recognizing that fact, this Act does not accord any such "finality" to air mail rates.

C. The Guaranteed Profit Argument.

Ostensibly to illustrate a policy argument, the Board suggests that its 1945 rate prophecy, formulated on rosy guesses of revenue, was very generous; the implication is that it did not prove unreasonably low, although the petition alleges the contrary. It insinuates that since TWA did not appeal, it accepted "the theory of regulation which those rates embodied" (Res. Br., p. 39), although there was not the slightest intimation in its 1945 opinion of the Board's present position, and TWA could not have questioned a non-existent gratuitous dictum to that effect by taking an appeal. It implies that TWA should have sought relief earlier, although its 1945 opinion itself shows that TWA was adjured not to complain even though "on the basis of reported results for selected short periods the rate may appear either unduly high or unduly low" (Res. Br., p. 6).[68] It says that TWA is really asking that the "ground should once again be retraced" (Res. Br., pp. 38-39), and

[68] *Cf. Macon, Dublin & Savannah Rd. Co. v. United States*, 78 C. Cl. 251 (Pet. Br., pp. 51-52); *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), *supra*, note 66; and the new route cases in which the Board granted retrospective relief back of the institution of the proceedings, although the airlines could readily have filed petitions long before (Res. Br., pp. 85-86).

"really seeks" a guaranteed profit, or a guaranty against losses, on all its past operations (Res. Br., pp. 19, 40, 44).[69]

These groundless innuendoes only divert attention from the real issue. The sole question here is whether, if the Board determines, after an examination of the facts which developed after the rate prophecy was made, that the prophecy turned out to be false, it has power to *adjust* the rate in the light of actualities to provide "reasonable compensation."

If Congress decided that the development of an air transport system was so vital to the country's security and other national interests that mail pay should be used to guarantee efficient airlines a profit or insure them against losses, the wisdom of its conclusion would not be reviewable here. "Congress, not this Court or the other federal courts, is the custodian of the national purse." *United States* v. *Standard Oil Co.*, 332 U. S. 332 U. S. 301, 314.

But how TWA's "reasonable compensation" should be computed, after the facts are examined, is not in issue now. That question will be for the Board to determine in the first instance, after a hearing on the facts. This Court is not being asked, and could not possibly decide, that presently hypothetical question. It is entirely irrelevant here whether an adjusted reasonable rate would or would not entitle TWA to a guaranteed profit or a guaranty against losses, either on all its operations or on its mail operations;

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[69] The Board's pretended horror at the "cost plus" spectre which it conjures up stands in ironical contrast to its statement in *Western Air Lines, Inc.*, Order No. E-2333 (Dec. 30, 1948), quoted in Res. Br., p. 92, note 89. There the Board, proposing to punish the airline for keeping a "protective petition" on file by reducing its mail pay retrospectively back to 1944, said: "The effect of keeping the mail rate constantly in issue through the device of 'protective' petitions, is to place the carrier *on a cost plus basis*" (p. 5).

or conceivably be some other rate which might fall within the zone of reasonableness. The Board has held that it is powerless to make *any* adjustment in the rate even though it was unreasonably low.

Nobody contends that "Congress gave the Board a blank check" (Res. Br., p. 44). It prescribed the standards which the Board should consider in determining fair and reasonable rates of compensation. Admittedly the Board applies those standards retrospectively when it revises an avowedly "temporary" rate or adjusts mail rates back to the date when a proceeding was begun. All that TWA "really seeks" is that the Board apply the very same standards, in the very same way, back to the date when it claims the rate became unreasonably low. The Board would not guarantee profit or underwrite losses any more in one situation than another. It would not have to give any more weight to an audit of proper costs than it gives right now when making its concededly retrospective adjustments. The whole argument is entirely specious.

D. The Rate Reduction Argument.

1. The Board says that the exercise of a power to reduce rates would remove "all incentive toward managerial efficiency and the development of nonmail revenues," and prevent airlines from planning for the future (Res. Br., p. 42). These avowals of solicitude may be contrasted with its proposal, made barely a month ago, to punish an airline for keeping a "protective petition" on file by reducing its *1944* rate.[70] The Board said nothing at all about the removal of "incentive" or the effect on the airline's plans.

[70] In *Western Air Lines, Inc.*, Order No. E-2333 (Dec. 30, 1948), the Board proposed to recapture "relatively high profits received" in 1944 (p. 4), for the reasons quoted in Res. Br., p. 92, note. 89.

Nothing in the Act remotely suggests that Congress sought to inspire airlines to greater efficiency by assuring them complete immunity against recapture of exorbitant mail pay. The airlines have ample incentive to efficiency without that immunity, if only because §406(b) of the Act specifically provides that mail pay is based on the exercise of "honest, economical, and efficient management." The inducement held out to them was "reasonable compensation," not exorbitant compensation.

2. Of course the Board would not "*have to* recapture excessive profits earned in the past" if it determined after a hearing that this would defeat the purposes of the Act.[71] Later it admits this but argues that "the vice of the situation lies in the existence of the power as much as in its exercise, for its mere existence gives rise to uncertainty" (Res. Br., p. 43). But the Board concededly now has, and occasionally exercises, the power to reduce rates retrospectively back to the date of the proceeding. Yet the "uncertainty" supposed to be engendered from the existence of that power has not served to reduce the airlines' incentive to efficiency, or prevented them from planning for the future. If the Board thinks otherwise, it should ask Congress to deprive it of all power to reduce mail pay retrospectively.

E. The Uniform Rate Argument.

The Board asserts that, if the "make effective" clause is interpreted as it reads, airlines would have no "incentive to live" within a uniform rate set for several "carriers

[71] See, *e.g.*, *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 561; *American Airlines, Inc., et al. Mail Rates*, 4 C. A. B. 90, 92-93.

with similar characteristics" (Res. Br., p. 44). Section 406(b) of the Act does not require, but only permits, the Board to fix a uniform rate for a class of airlines. If the Board's experience with uniform class rates is any criterion (see Pet. Br., pp. 12-13, note 4), their value is highly dubious. But the argument is basically unsound, since an airline could never obtain "relief from the uniform rate" if it did not try to live within it, for it would not be operating "under honest, economical, and efficient management." Besides, when events operate entirely differently on the members of a "class," the preconceived pattern of uniformity must yield to the logic of events.

F. The Constitutional Point.

Whether air mail carriers were placed under the same "abrupt legal compulsion imposed on the existing railroads by the Railway Mail Pay Act" (Res. Br., p. 96) is utterly immaterial. The controlling fact is that, as already seen, once an airline occupies the status of an authorized mail carrier, it is forced to carry mail. Therefore its right to compensation *is* defined by the Fifth Amendment.

In *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, the Court did not express "the opinion that no constitutional right accrued until a petition challenging the rate was filed" (Res. Br., p. 94). That question was not at issue there. The Court merely pointed out, for purposes of discussion, that the situation before it was different from the point arising here.[72]

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[72] Doubtless constitutional rights can be waived, but whether they have been waived raises a question of fact, which has not yet been examined. *Cf.* the cases cited *supra*, note 68.

The dissimilarity of the public utility cases to which the Board refers has already been shown (Pet. Br., p. 80, note 119). No case cited by the Board held that, when it is practically feasible to adjust compensation for compulsory services rendered in the past, the Constitution permits it to be fictitiously frozen at an unreasonable figure. The Act should be construed to avoid the serious constitutional question which arises under the Board's construction.

Summary

The Board really asks this Court to sit as a super-legislature, choose between the numerous policies which were open to Congress, and rewrite the Act so as to substitute for the broad power of §406(a)(1) the words used in one of the public utility rate provisions of the statute. "We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute . . . However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 493. The plain language of this Act gives the Board the power denied it by the decision below.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the proceeding remanded to the Board for a hearing on the merits.

Respectfully submitted,

GERALD B. BRODPHY,
Attorney for Petitioner.

CHARLES PICKETT,
JOSEPH S. ISEMAN,
of Counsel.

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